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Personal Torts

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PERSONAL TORTS

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I. NEGLIGENCE

A. DUTY

DURING the Survey period, Texas courts decided a number of cases interpreting the evolving concept of duty. *Gutierrez v. Scripps-Howard*[1] analyzed a newspaper's duty to warn a freelance photographer of the dangers involved in an assignment. The newspaper assigned the photographer to take pictures of a hotel opening in Juarez, Mexico, where he sustained personal injuries for which he sued. The El Paso court of appeals reasoned that because the newspaper previously published articles claiming the hotel owner was a "drug czar" and the fact that drug dealers are violent, the newspaper had a duty to warn the photographer of the dangers involved in the assignment.[2] The court expressly rejected the newspaper's argument under *Nixon v. Mr. Property Management Co.*[3] that to be liable they must be aware of similar prior criminal activity. The court concluded that the summary judgment was improper because the defendant did not prove there was no material issue of fact as to whether the assault resulted from the newspaper's articles.[4]

McCullough v. Amstar Corp.[5] held that a defendant had no duty when he could not reasonably have foreseen the risk.[6] McCullough alleged that he suffered heart problems as a result of inhaling toxic fumes while loading a corn by-product. The summary judgment evidence sufficiently established that the defendant could not reasonably foresee any risk because plaintiff's reaction was unique and unprecedented.[7] Since the danger was unforeseeable, the defendant did not owe any duty.

Western Co. of North America v. Southern Pacific Transportation Co.[8] is another case where Texas courts have further defined the concept of duty.

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1. 823 S.W.2d 696 (Tex. App.—El Paso 1992, writ denied).
2. *Id.* at 699.
3. 690 S.W.2d 546 (Tex. 1985).
4. *Gutierrez*, 823 S.W.2d at 702.
5. 833 S.W.2d 312 (Tex. App.—Amarillo 1992, n.w.h.).
6. *Id.* at 316.
7. *Id.* at 315.
8. 819 S.W.2d 952 (Tex. App.—Austin 1991, no writ).

In *Western Company*, a truck stopped at a stop sign with its trailer extending over the railroad tracks. The train ran into the truck and the railroad company sued the trucking company for negligence. The court of appeals concluded that the exclusion of evidence by the trial court tending to show that the track was located too close to the intersection amounting to a want of ordinary care, was reversible error.[9] The Austin court of appeals held that the creation or maintenance of an extra hazardous railroad crossing was encompassed within the ground of negligence and that the railroad company owed a duty of ordinary care.[10]

In *Williams v. Bill's Custom Fit, Inc.*[11] the plaintiff sued under the attractive nuisance doctrine to establish liability for leaving keys in a car. The fifteen year old plaintiff was injured while a passenger in a stolen vehicle. The court held that the plaintiff was a trespasser as to the automobile and that the defendant only owed the duty "not to injure him willfully, wantonly or through gross negligence."[12] It was irrelevant whether the plaintiff knew the car was stolen since he committed the trespass by voluntary act.[13]

In *Elliot v. State of Texas*[14] the San Antonio court of appeals held that a park officer does not have a duty to insure the safety of boaters.[15] A park officer cited a boater for failing to have a life preserver in his boat. Shortly thereafter, the boater fell in the water and drowned. His estate brought a wrongful death action alleging negligence against the park officer. In finding no duty, the court relied on *Dent v. City of Dallas*[16] which held that law enforcement officers are not the insurers of the safety of law violators.[17]

Puente v. A.S.I. Signs[18] and *Ball v. SGB Construction Services, Inc.*[19] both stated that a defendant did not owe a duty when it did not install or inspect the object causing injury. In *Puente*, the plaintiff alleged that the defendant company owed a duty of care because it inspected or should have inspected the signs while on the property to install other signs. The court in *Puente* determined that a company owed no legal duty to inspect signs that it had not made, designed, or installed.[20] Similarly, the *Ball* court held that the scaffolding supplier did not owe a duty to the subcontractor's injured employee where it neither determined quantities or types of scaffolding materials required nor erected the scaffolding.[21]

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9. *Id.* at 955.
10. *Id.* at 956.
11. 821 S.W.2d 432 (Tex. App.—Waco 1991, no writ).
12. *Id.* at 434.
13. *Id.* at 435.
14. 818 S.W.2d 71 (Tex. App.—San Antonio 1991, writ denied).
15. *Id.* at 74.
16. 729 S.W.2d 114 (Tex. App.—Dallas 1986, writ ref'd n.r.e.), *cert. denied*, 485 U.S. 977 (1988).
17. *Id.* at 117.
18. 821 S.W.2d 400 (Tex. App.—Corpus Christi 1991, writ denied).
19. 820 S.W.2d 916 (Tex. App.—Houston [1st Dist.] 1991, no writ).
20. *Puente*, 821 S.W.2d at 402.
21. *Ball*, 820 S.W.2d at 918.

B. CAUSATION

Proximate cause is the next element to be considered in a negligence case. Proximate cause is defined as

> cause which, in the natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.[22]

In *Almaraz v. Burke*[23] the court affirmed a jury's findings that the negligence of a driver who caused a first accident proximately caused a second accident which occurred ten minutes later.[24] The defendant argued that there was no evidence to support questions concerning negligence because he was ten minutes down the road when the second accident occurred. The court reasoned, however, that a jury could have concluded from the evidence that the defendant driver caused the first accident and conditionally and proximately caused the second accident.[25] The court distinguished this case from *Bell v. Campbell*,[26] where an accident occurred and the drivers involved were not liable for injuries caused by the subsequent accident because the injuries were unforeseeable. In contrast, the *Almaraz* court reasoned that the conditions resulting from the first accident made it foreseeable that a second accident would occur.[27]

In *Travis v. City of Mesquite*,[28] the Texas Supreme Court held that police officers are not insulated from liability as a matter of law for damages proximately caused by a high speed chase.[29] The reasonableness of their actions is a fact issue which must be determined by a jury.

In *Fitzsimmons v. Brake Check, Inc.*,[30] a wheel that fell off a car due to faulty repairs was not the proximate cause of an auto accident. In that case, a driver stopped to avoid the tire and was struck from behind by a truck. The driver sued the automobile repair shop contending that the faulty repairs were the proximate cause of the collision. Contrary to the driver's contention, the court found that the truck driver who struck her from be-

22. 1 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 2.04 (1987).
23. 827 S.W.2d 80 (Tex. App.—Fort Worth 1992, writ denied).
24. *Id.* at 81.
25. *Id.* A van driven by Almaraz, hit a Fiat leaving it disabled and sitting sideways on the overhead. Ten minutes later Burke drove his Bronco into the Fiat and another driver crashed into Burke's Bronco.
26. 434 S.W.2d 117, 121 (Tex. 1968).
27. *Almaraz*, 827 S.W.2d at 82.
28. 830 S.W. 2d 94 (Tex. 1992). When the Texas Supreme Court originally released this opinion, it held that the police officers may be liable for an accident that is caused by a high speed chase, if, under the circumstances the chase was unreasonable. The opinion also discussed the applicability of 42 U.S.C. § 1983 and state law immunity. 34 Sup. Ct. J. 231 (December 31, 1990). However, on rehearing, that opinion was withdrawn and replaced by the current opinion which held that material issues of fact exist as to whether off-duty police officers, who are involved in a high speed chase of a suspect, proximately caused the accident thereby precluding summary judgment.
29. 830 S.W.2d at 96.
30. 832 S.W.2d 446 (Tex. App.—Houston [14th Dist.] 1992, n.w.h.).

hind was the sole proximate cause of the accident.[31]

In *Otis Elevator Co. v. Shows*[32] a child's hand was caught between the handrail and the handrail guard of the escalator. The defendants argued that the child proximately caused her own injuries and as a result, defendant was entitled to an instruction on the issue of unavoidable accident. The trial court refused defendants' request and the court of appeals affirmed holding that since the escalator had handrail guards to prevent such an occurrence, the accident was foreseeable and therefore not unavoidable.[33] Further, the court of appeals noted an unavoidable accident instruction would have been an improper comment on the weight of the evidence.[34]

Finally, in *Hughes v. Thrash*[35] a bail of cotton fell on the plaintiff. The court held that the plaintiff was not required to prove the precise cause of the accident but rather only that the defendant knew the bail could fall and that it in fact did fall.[36] Despite the defendant's arguments to the contrary, the court concluded that the defendant's knowledge of the danger was the only relevant area of inquiry.[37]

C. NEGLIGENT ENTRUSTMENT

Loom Craft Carpet Mills, Inc. v. Gorrell[38] established that "negligent entrustment liability is derivative in nature."[39] Following a night of drinking, Gorrell was injured when he fell after getting out of a truck which then ran over him. The jury found the driver of the truck eighty-five percent at fault and Gorrell fifteen percent at fault. On appeal, the defendants argued that comparative negligence should have been attributed to the owners of the truck as well as the driver and Gorrell. The court expressly rejected this argument concluding that "the better rule is to apportion fault only among those directly involved in the accident and to hold the entruster liable for the percentage of fault apportioned to the driver."[40] The court expressly declined to follow cases from other jurisdictions where fault was apportioned to the entruster.[41] Further, the court held that "[i]f the owner is negligent, his liability for the acts of the driver is established, and the degree of negli-

31. *Id.* at 449.
32. 822 S.W.2d 59 (Tex. App.—Houston [1st Dist.] 1991, writ denied).
33. *Id.* at 63.
34. The definition of unavoidable accident includes "such non-human things as fog, snow, sleet, wet or slick pavement, or obstruction of the view." Yarborough v. Berner, 467 S.W.2d 188, 191 (Tex. 1971). In order to be entitled to an instruction on unavoidable accident, there must be affirmative evidence brought forth of the causal connection between the occurrence in question and some extraneous condition or event other than the conduct of the parties to the occurrence. Hukill v. H.E.B. Food Stores, Inc., 756 S.W.2d 840, 843 (Tex. App.—Corpus Christi 1988, no writ); Leatherwood Drilling Co. v. TXL Oil Corp., 379 S.W.2d 693, 697 (Tex. Civ. App.—Dallas 1964, writ ref'd n.r.e.).
35. 832 S.W.2d 779 (Tex. App.—Houston [1st Dist.] 1992, n.w.h.).
36. *Id.* at 783.
37. *Id.* at 783-84.
38. 823 S.W.2d 431 (Tex. App.—Texarkana 1992, n.w.h.).
39. *Id.* at 432.
40. *Id.*
41. *Id.* at n.7.

gence of the owner would be of no consequence."[42]

D. Criminal Conduct by a Third Party

The Texas Supreme Court heard two significant cases dealing with liability for damages caused by the criminal conduct of third parties. *Havner v. E-Z Mart Stores, Inc.*[43] involved the abduction and murder of a convenience store clerk. There were no witnesses and the assailant was never caught. Her family brought wrongful death and survival actions against the store's owner alleging that the employer's failure to provide a safe place to work was the proximate cause of her abduction, rape, and murder. The trial court rendered judgment against E-Z Mart and the court of appeals reversed, holding that there was no evidence that inadequate security measures at the store were the cause of her death.[44] Further, the court of appeals held that since there were no witnesses, there was no evidence that Havner would have been in a position to use security devices if installed, or that such devices would have prevented her abduction.[45] The Texas Supreme Court reversed the court of appeals and held that producing cause could be demonstrated by circumstantial evidence and that expert testimony of investigating police officers was some evidence of causation.[46] The plaintiffs were not required to "prove their case to an absolute degree of certainty" by disproving other possible causes.[47] The case was remanded back to the Texarkana court of appeals, which held that the evidence on causation was factually insufficient.[48] The Texas Supreme Court again granted writ of error to consider whether the court of appeals erred in their holding.[49]

The Texas Supreme Court has granted writ of error in *Exxon Corp. v. Tidwell*[50] to consider the extent of a landlord's duty to the employees of its tenants. In this case, a gas station employee was shot during a robbery at an Exxon service station leased to his employer. The trial court rendered judgment against Exxon.[51] The court of appeals affirmed, concluding that Exxon breached its duty of care.[52] The court of appeals held that Exxon owed the employee a duty of care because Exxon retained extensive control over the service station's operations under the lease, and that security measures taken at other stations leased by Exxon had not been implemented at this particular station.[53]

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42. *Id.* at 432.
43. 825 S.W.2d 456 (Tex. 1992).
44. *Id.* at 457.
45. *Id.* at 460-61.
46. *Id.* at 461.
47. *Id.* at 460.
48. 832 S.W.2d 368, 374 (Tex. App.—Texarkana 1992, writ granted).
49. 36 Tex. Sup. Ct. J. 334 (December 16, 1992).
50. 816 S.W.2d 455 (Tex. App.—Dallas 1991, writ granted).
51. *Id.* at 468.
52. *Id.*
53. *Id.* at 464, 468.

E. PREMISES LIABILITY

Mud is mud as a matter of law! A divided Texas Supreme Court so determined in *Brownsville Navigation District v. Izaguirre*.[54] The court held that ground which becomes soft and muddy when wet is "not a condition which involves unreasonable risk of physical harm to persons on land" so as to give rise to a landlord's duty to disclose the condition to the tenant.[55] Izaguirre was crushed to death when the trailer that he was working in fell over because the supports sank into the muddy ground causing the cargo to fall on him. The jury awarded more than two million dollars in damages. The court of appeals affirmed the judgment on the basis that the lessor failed to warn of a dangerous condition on the premises unknown to the lessee and because the lessor breached his duty to warn the lessee of a prior similar accident at another location.[56] The Texas Supreme Court reversed the judgment and noted that a lessor of land is not generally liable to a lessee for physical harm caused by a dangerous condition that existed when the lessee took possession.[57] The majority recognized that an exception to the general rule applies to dangerous conditions that involve unreasonable risk of physical harm if the lessee does not know or have reason to know of the condition and the lessor knows or has reason to know of the condition and risk, and has reason to expect that the lessee would not discover the condition or realize the risk.[58] The majority held this exception not applicable to this case because what caused the death was the ground itself "which, like most ground, turned to mud in the rain."[59] The court also rejected the claim that the district had a duty to warn the lessee about a prior similar accident because the testimony only reflected personal concerns of one employee and did not establish a duty by the lessor which it negligently executed.[60]

Justice Doggett wrote a spirited dissent in which Justices Mauzy and Gammage joined. The dissent emphasized that there is no such thing in Texas as "ordinary dirt."[61] Justice Doggett argued that the proper focus of the inquiry is not on "ordinary dirt" but rather should be on the unusual conditions present and the knowledge of the risk that was involved.[62] The dissent concluded, "with an analysis that is as clear as mud, the majority once again expresses a preference for second guessing the public spirited citizens who serve as jurors."[63]

Three court of appeals cases have held that retaining control over work or property can lead to the imposition of a duty. In the first case, *Pena v. TXO Production Corp.*,[64] the court held that evidence that a general contractor

54. 829 S.W.2d 159 (Tex. 1992).
55. *Id.* at 161.
56. 800 S.W.2d at 249-50.
57. 829 S.W.2d at 160.
58. *Id.* at 161.
59. *Id.* at 160.
60. *Id.* at 161.
61. *Id.* at 162.
62. *Id.*
63. *Id.* at 163.
64. 828 S.W.2d 188 (Tex. App.—Corpus Christi 1992, n.w.h.).

supervised an independent contractor's work and gave step-by-step instructions as to the order of that work, raised a fact issue as to whether the general contractor and lessee owed a duty of care to the employee of the independent contractor.[65] The court explained that because the contractor was in control of the premises and retained control over the independent contractor's work, it may be liable for injuries caused by its negligent exercise of that control.[66]

In *Wal-Mart Stores, Inc. v. Alexander*[67] the plaintiff tripped on an entry ramp in the parking lot of a Sam's Wholesale Club. Defendant's lease did not extend beyond the walls of the building, yet they had constructed an entry ramp without asking for permission from the lessor. The court of appeals held that even though defendant had no duty to maintain the ramp under the terms of the lease, a legal duty arose to maintain the ramp in a safe manner since they built the ramp and exercised sufficient control over it.[68] The Texas Supreme Court granted writ of error to consider whether the evidence of defendant's gross sales was harmful error.[69]

In the third case, a trustee was held to be liable in *Rauch v. Patterson*[70] because he held legal title and right of possession of the trust property. The court held that the evidence established the trustee's control of the property and a duty to the plaintiff as a business invitee.[71]

Whether a party has a duty to warn a licensee of danger was discussed in two other court of appeals cases. In *Peters v. Detsco, Inc.*,[72] a fireman brought an action against an independent contractor who performed work on the premises of a service station where the fireman was injured. In reversing the trial court, the court of appeals held that a contractor who has control of the premises and who has created the danger, has the same duty to licensees as the owner of the premises.[73] In the second case, *Smith v. Andrews*,[74] the Fort Worth court of appeals held that a plaintiff that had seen horses and rodeos on television had sufficient knowledge that horses kick, thus relieving the defendant from the duty to warn him not to go inside the corral.[75] The defendant had not either expressly or impliedly invited the plaintiff into the corral, therefore the plaintiff was classified as a licensee.[76] Accordingly, the appellate court reversed and rendered judgment in favor of the defendant.

In *Baldwin v. Texas Utilities Electric Co.*[77] a man drowned while trespass-

65. *Id.* at 191.
66. *Id.* at 190.
67. 827 S.W.2d 420 (Tex. App.—Corpus Christi 1992, writ granted).
68. *Id.* at 422.
69. 35 Tex. Sup. Ct. J. 1118 (September 9, 1992).
70. 832 S.W.2d 57 (Tex. App.—Houston [14th Dist.] 1992, writ denied).
71. *Id.* at 59, 60.
72. 820 S.W.2d 38 (Tex. App.—Houston [14th Dist.] 1991, writ denied).
73. *Id.* at 40.
74. 832 S.W.2d 395 (Tex. App.—Fort Worth 1992, writ denied).
75. *Id.* at 397.
76. *Id.*
77. 819 S.W.2d 264 (Tex. App.—Eastland 1991, writ denied).

ing on property owned by Texas Utilities Electric Company. His parents sued Texas Utilities alleging that the company was grossly negligent. The trial court granted summary judgment and the court of appeals affirmed holding that no genuine issue of fact existed because the land was fenced, it contained no trespassing and warning signs, and the deceased was a trespasser.[78] In short, the court found there was no "want of care" by Texas Utilities.[79] Likewise in *Smither v. Texas Utilities Electric Co.*[80] the El Paso court of appeals affirmed a summary judgment in favor of the utility company.[81] The court noted that the property was enclosed by a six foot fence topped with three strands of barbed wire, and no trespassing and danger signs were posted. Texas Utilities also employed private security guards to patrol the area, and the decedent was a trespasser. The evidence established that the defendant was not guilty of negligence.[82]

In another summary judgment case involving a trespasser, a Houston court of appeals held in *Payne v. Cinco Ranch Venture T.M.C.*[83] that the defendant's summary judgment evidence did not negate the material issue of fact as to whether the plaintiff was injured as a result of the defendant's gross negligence.[84] Issues remained as to whether an agent of the defendant knew of the hazard to the plaintiff, and whether a reasonable land owner who knew the plaintiff swam there would have realized the risk.[85]

The final case on premises liability in this Survey, *Haight v. Savoy Apartments*,[86] dealt with an apartment complex's liability for a foreseeable assault. In this case, a young woman was sexually assaulted and murdered by an employee of the apartment complex at the complex's swimming pool. The complex owners had not run a thorough background check on the employee and were not aware of his prior assault convictions. Additionally, the complex's security personnel did not respond to the late-night, loud, drinking party at the pool that preceded the assault. The trial court granted the defendant's motion for summary judgment on the grounds that the harm to the victim was not foreseeable and thus the defendant did not have a duty to protect her. The court of appeals reversed, holding that issues of fact existed regarding the foreseeability of harm and whether the complex may be liable if the criminal conduct was a foreseeable result of their negligence.[87] The court of appeals expressly rejected the defendant's contention that the assault was not foreseeable because there was no evidence of prior assaults or crimes on the premises.[88]

78. *Id.* at 265-66.
79. *Id.* at 266.
80. 824 S.W.2d 693 (Tex. App.—El Paso 1992, writ dism'd by agr.).
81. *Id.*
82. *Id.* at 696.
83. 822 S.W.2d 364 (Tex. App.—Houston [1st Dist.] 1992, n.w.h.).
84. *Id.* at 366.
85. *Id.*
86. 814 S.W.2d 849 (Tex. App.—Houston [1st Dist.] 1991, writ denied).
87. *Id.* at 853.
88. *Id.*

F. DRAM SHOP

The Texas Supreme Court granted a writ of error in *Sewell v. Smith*[89] to determine whether the Dram Shop Act[90] provides an intoxicated person with a cause of action to recover for his own injuries against a seller of alcoholic beverages. The plaintiff sued the owner of a bar for injuries he sustained in a one-car accident on his way home from the bar. The trial court granted summary judgment for the bar owner and the court of appeals reversed in part, holding that an intoxicated person has a cause of action for the person's own injuries against the server of alcohol under the Dram Shop Act.[91] In this case of first impression, the Dallas court of appeals relied on the Texas Supreme Court's decision in *El Chico Corp. v. Pool*.[92]

Further, in *Beard v. Graff*[93] the Texas Supreme Court is considering whether a social host may be held liable for serving alcohol to intoxicated guests and allowing them to drive and cause an accident. In this case, Beard was injured when he was struck by an intoxicated driver who had left the home of the Graffs. The trial court granted defendant's special exceptions in which they claimed that Texas law does not allow recovery in social host liquor liability cases. The court of appeals, sitting en banc, reversed and remanded for trial on the basis that Texas common law and public policy support such a cause of action.[94] The Texas Supreme Court is currently considering whether such a cause of action exists in Texas.

G. VICARIOUS LIABILITY

In *Lara v. Lile*[95] the court of appeals reversed a summary judgment because the defendant did not establish as a matter of law that the driver who backed over the decedent was acting as a borrowed servant of another employer at the time of the accident.[96] The court of appeals reversed summary judgment for the following reasons: the defendant owned the truck; the defendant's driver was expected to drive the truck that ran over the decedent; the defendant's employees followed the other employer's directions only when they entered the job site; and the defendant continued to control them in their manner of operating and caring for his equipment.[97]

II. PROFESSIONAL NEGLIGENCE

A. MEDICAL MALPRACTICE — DUTY

Three significant summary judgment cases were decided during the Sur-

89. 819 S.W.2d 565 (Tex. App.—Dallas 1991, writ granted).
90. TEX. ALCO. BEV. CODE ANN. § 2.03 (Vernon Supp. 1993).
91. 819 S.W.2d at 568.
92. 732 S.W.2d 306, 312 (Tex. 1987).
93. 801 S.W.2d 158 (Tex. App.—San Antonio 1990, writ granted) (en banc).
94. *Id.* at 161.
95. 828 S.W.2d 536 (Tex. App.—Corpus Christi 1992, writ denied).
96. *Id.* at 540-41.
97. *Id.* at 540.

vey period dealing with a doctor's duty to a patient. In *Wilson v. Winsett*[98] the trial court granted summary judgment for the defendant and the court of appeals affirmed on the basis that no duty of care arose because no physician-patient relationship ever existed.[99] The decedent was examined by Dr. Merrill at the request of the Texas Rehabilitation Commission to determine her rehabilitative potential. The doctor noted a mass in the decedent's lung in his report to the Commission, but he neither gave the woman a report of his examination nor informed her of the mass. Four months later another doctor discovered the mass and the woman died a year later. Relying on *Johnston v. Sibley*,[100] the court of appeals held that a doctor who does not intend to treat or care for a patient and is hired by a third-party, is only under a duty not to harm the patient because no physician-patient relationship exists.[101] The court of appeals also noted that the outcome might have been different had the decedent asked the doctor for a copy of the report.[102] The Texas Supreme Court granted writ of error to determine whether an examining physician's duty is violated if the physician fails to inform the examinee of a life-threatening condition that is revealed by the examination.[103]

Likewise, *Wilson, Fought v. Solce*[104] held that in the absence of a doctor-patient relationship, a doctor has no duty.[105] In this case, the plaintiff was taken to a hospital emergency room after being injured in a motorcycle accident. The defendant doctor was on call that day but refused to come to the hospital to treat the plaintiff. The plaintiff's leg was eventually amputated and he brought suit against the on-call orthopedist alleging that the orthopedist refused to treat him because he had no proof of medical insurance. The court of appeals noted that no doctor-patient relationship existed between the parties and that the fact that the doctor was voluntarily on call did not in itself impose a duty because he was not required to be on call in order to maintain privileges at the hospital.[106] The plaintiff also alleged that the doctor's refusal to treat him constituted negligence per se because the doctor violated former article 4438a of the Texas Revised Civil Statutes.[107] In affirming the trial court's summary judgment, the court of appeals noted that the legislature did not intend the act to impose liability on a doctor who failed to respond to a phone call requesting him to go to a hospital and treat a person he did not know.[108]

In *Owens v. Litton*[109] the court of appeals reversed the trial court's sum-

98. 828 S.W.2d 231 (Tex. App.—Amarillo 1992, writ granted).
99. *Id.* at 233.
100. 558 S.W.2d 135, 137-38 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.).
101. *Wilson*, 828 S.W.2d at 233.
102. *Id.*
103. 35 Tex. Sup. Ct. J. 1118 (Sept. 12, 1992).
104. 821 S.W.2d 218 (Tex. App.—Houston [1st Dist.] 1991, writ denied).
105. *Id.* at 220.
106. *Id.*
107. TEX. REV. CIV. STAT. ANN. art. 4438a (Vernon 1986).
108. *Id.* at 221.
109. 822 S.W.2d 794 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

mary judgment, finding a fact question existed as to whether the defendant had a right of control rather than actual control, which imposed a duty to the patient.[110] Further, the court of appeals held that the defendant's summary judgment proof failed to establish as a matter of law that the plaintiff had no cause of action against him.[111]

B. MEDICAL MALPRACTICE — STANDARD OF CARE

Several summary judgment cases decided during the Survey period illustrated the need to prove the standard of care in medical negligence cases. In *Gonzales v. Outlar*[112] the court of appeals overturned a summary judgment in favor of the physician. Relying on *Evans v. Conley*,[113] the court held that to obtain a summary judgment, the movant must conclusively establish the standard of care and that the treatment was within that standard.[114] The court reasoned that the physician's affidavit did not provide any measurement by which a trier of fact could determine if the specific medical procedures and techniques used met the standard of care.[115] Conversely, in *Rinando v. Stern*[116] the court of appeals held that a hypothetical question not based on direct evidence is insufficient to raise a question of fact as to whether a doctor violated the standard of care.[117] In affirming the summary judgment in favor of the doctor, the court of appeals reasoned that the doctor's evidence was sufficient to establish a standard of care and the plaintiff failed to tender any controverting evidence as to whether the doctor violated that standard.[118]

C. MEDICAL MALPRACTICE — LACK OF INFORMED CONSENT

In *Johnston v. Vilardi*[119] the court held that a cause of action based on negligence and a cause of action based on lack of informed consent are separate and distinct.[120] The court reasoned that the doctor's own evidence presented a factual dispute on a material issue in the informed consent cause of action.[121] Yet, the doctor did meet his burden in establishing that he met the standard of care in the negligence action. Thus, the court of appeals affirmed summary judgment with regards to the negligence cause of action, but reversed and remanded the lack of informed consent cause of action.

In *Melissinos v. Phamanivong*[122] the Texarkana court of appeals upheld the trial court's definition of informed consent and stated that the case was

110. *Id.* at 797.
111. *Id.*
112. 829 S.W.2d 931 (Tex. App.—Corpus Christi 1992, n.w.h.).
113. 787 S.W.2d 570, 572 (Tex. App.—Corpus Christi 1990, writ denied).
114. *Gonzales*, 829 S.W.2d at 934.
115. *Id.*
116. 831 S.W.2d 459 (Tex. App.—Houston [14th Dist.] 1992, n.w.h.).
117. *Id.* at 463.
118. *Id.* at 462.
119. 817 S.W.2d 794 (Tex. App.—Houston [1st Dist.] 1991, writ denied).
120. *Id.* at 797.
121. *Id.*
122. 823 S.W.2d 339 (Tex. App.—Texarkana 1991, writ denied).

properly submitted to the jury on the issues of lack of informed consent and fraud.[123] The court held that because there were misrepresentations in this case as well as a failure to disclose, the trial court was correct in submitting to the jury broad-formed questions based on common law fraud since the definition of informed consent does not include misrepresentations.[124]

III. PRODUCTS LIABILITY

A. DUTY

In *General Motors Corp. v. Saenz*[125] the Corpus Christi court of appeals held that the subsequent modification of a truck manufactured by G.M. did not relieve G.M. from liability for failing to warn against overloading the truck.[126] The court reasoned that since the truck was sold without a body, modifications were intended and foreseeable.[127] As such, the manufacturer has a duty to warn the customers not to alter the product in a foreseeably dangerous manner.[128] In this case, the truck was sold to a buyer who used it for towing trucks for fifteen years. The second buyer placed a 2,000 gallon water tank on the chassis and made other modifications. The third buyer filled the water tank so that the gross vehicle weight was exceeded, which caused the tires to blow out killing both the driver and passenger. The court distinguished this case from other Texas and federal cases in which the courts relieved the original manufacturers of responsibility for dangers caused by modifications to vehicles by second stage manufacturers.[129] The court explained that these modifications to the truck were not only foreseeable, but expected, which required an adequate warning regarding loading for virtually every foreseeably modification.[130] The court noted that since the evidence showed that it was foreseeable that overloading the truck could cause injuries, G.M. had a duty to provide an adequate warning to all users not to exceed the appropriate weight limits.[131] The Texas Supreme Court has granted writ on the issue of G.M.'s duty to warn and as to whether that failure to warn was a proximate cause or producing cause of the accident.[132]

Two other cases held that the reseller did not have a duty to warn because the risk of injury was not foreseeable. In *USX Corp. v. Salinas*[133] the court held that a product supplier is not liable for a failure to warn of unforeseeable dangers that exist at the time the product was marketed; in those cases, the plaintiff must show that the product supplier knew or should have

123. *Id.* at 344.
124. *Id.*
125. 829 S.W.2d 230 (Tex. App.—Corpus Christi 1991, writ granted).
126. *Id.*
127. *Id.*
128. *Id.*
129. See Verge v. Ford Motor Co., 581 F.2d 384 (3rd Cir. 1978); Trevino v. Yamaha Motor Co., 882 F.2d 182 (5th Cir. 1989); Elliott v. Century Chevrolet Co., 597 S.W.2d 563 (Tex. Civ. App.—Fort Worth 1980, writ ref n.r.e.).
130. 829 S.W.2d at 235.
131. *Id.* at 240.
132. 36 Tex. Sup. Ct. J. 137 (Nov. 4, 1992).
133. 818 S.W.2d 473 (Tex. App.—San Antonio 1991, writ denied).

known of the risks at the time of marketing.[134] The court noted that in a marketing defect case, "the four types of dangers which require a warning are: (1) a risk of danger inherent in the design of a product; (2) foreseeable dangers or risk of harm from unintended uses of a product; (3) risks of dangers that affect only a limited number of users susceptible to a danger in the product; and (4) unavoidably unsafe products."[135] Relying on *Aluminum Co. of America v. ALM*,[136] the court held that the plaintiff had the burden to prove the downstream retailer knew or should have known of the risks at the time of marketing.[137] By failing to introduce factually sufficient evidence on this point, the plaintiff did not establish that defendant owed any duty.[138]

In *Schmidt v. Centex Beverage, Inc.*[139] the plaintiff sued a wholesale beer distributor for injuries he suffered from allegedly intoxicated volunteers at a music festival. Schmidt had trespassed into a musical festival and was injured by the festival volunteers who the beer wholesaler knew would receive free beer from the promoter. Schmidt argued that the wholesale beer distributor had a duty to warn consumers of the effects of intoxication. Relying on *Joseph E. Seagram & Sons, Inc. v. McGuire*,[140] the court held the effects of alcohol consumption are within the common-knowledge exception to strict liability and that Centex had no duty to warn.[141] The *Schmidt* court distinguished this case from *Brune v. Brown Forman Corp.*[142] which held that acute alcohol poisoning did not fall within the common-knowledge exception because the dangers of acute alcohol poisoning are extreme and are not commonly known.[143]

B. Federal Preemption

In *Cipollone v. Liggett Group*[144] the United States Supreme Court held that the Public Health Cigarette Smoking Act of 1969 does preempt claims based on cigarette manufacturer's failure to warn.[145] However, the Court also held that the 1969 Act does *not* preempt claims based on express warranty, intentional fraud, misrepresentation based on fraudulent claims and advertisements, or conspiracy to misrepresent or conceal material facts.[146] In this case, the plaintiff contracted lung cancer after many years of smoking cigarettes and sued the cigarette manufacturers for breach of express warranties in their advertising, failure to warn consumers about the hazards of

134. *Id.* at 483.
135. *Id.*
136. 785 S.W. 137 (Tex. 1990), *cert. denied*, 498 U.S. 847 (1990).
137. *USX Corp.*, 818 S.W. 2d at 483.
138. *Id.* at 487.
139. 825 S.W.2d 791 (Tex. App.—Austin 1992, n.w.h.).
140. 814 S.W.2d 385 (Tex. 1991) (which held that manufacturers of alcoholic beverages have no duty to warn consumers of the dangers of chronic alcoholism because such dangers are commonly known).
141. *Schmidt*, 825 S.W.2d at 794.
142. 758 S.W.2d 827 (Tex. App.—Corpus Christi 1988, writ denied).
143. *Id.* at 831.
144. 112 S. Ct. 2608 (1992).
145. *Id.* at 2621-22.
146. *Id.* at 2622-24.

smoking, fraudulently misrepresenting those hazards to consumers, and conspiring to deprive the public of medical and scientific information about smoking. The Court held that the claim based on breach of express warranty was not preempted because it rests on a duty voluntarily undertaken by advertising, rather than a duty imposed under state law.[147] The Court held that the failure to warn and fraudulent misrepresentation claims are preempted due to the effect of federally mandated warning labels.[148] On the other hand, the Court held that the claim based on allegedly fraudulent statements in the defendant's advertisements as well as a conspiracy claim were not preempted.[149]

Like *Cipollone*, Texas courts have also recognized that state causes of action may exist despite the presence of federal statutes or standards promulgated in the area or field. In *Carlisle v. Phillip Morris, Inc.*[150] cigarette smokers and their families sued several cigarette manufacturers, wholesalers and industry representatives under Texas state law theories of failure to warn, design defects, manufacturing defects, misrepresentations and civil conspiracy. The trial court granted the tobacco industry's motion for summary judgment on the grounds that the federal act preempted all claims asserted by the plaintiffs. The court of appeals reversed and remanded the cause for trial on the grounds that none of the claims were preempted.[151] After contemplating this issue for over a year, the Texas Supreme Court denied the tobacco industry's application for writ of error, thereby allowing the case to be remanded for trial on the state law causes of action against the tobacco industry.[152]

The San Antonio court of appeals in *Macmillan v. Redman Homes, Inc.*[153] held that federal standards did not preempt a state cause of action against repairers of mobile homes.[154] The plaintiffs bought a used mobile home which had been repossessed from the original owner and repaired. They alleged that the home was unsafe due to excessive levels of formaldehyde gas. The trial court dismissed the lawsuit for failure to state a cause of action which would allow recovery. The court of appeals reversed the trial court on the grounds that federal safety standards did not apply to actions for improper repair of used mobile homes; neither the language of the act nor federal policy would prohibit the application of state law to actions against repairmen.[155]

147. *Id.* at 2622-23.
148. *Id.* at 2623.
149. *Id.* at 2623-24.
150. 805 S.W.2d 498 (Tex. App.—Austin 1991, writ denied).
151. *Id.* at 517.
152. 36 Tex. Sup. Ct. J. 192 (November 18, 1992).
153. 818 S.W.2d 87 (Tex. App.—San Antonio 1991, writ denied).
154. *Id.* at 97.
155. *Id.*

C. DEFENSES

Dresser Industries, Inc. v. Lee[156] reaffirmed the rule stated in *Varela v. American Petrofina Co.*[157] which holds that evidence of an employer's contributory negligence is inadmissible in a suit by an employee against a third-party manufacturer.[158] The plaintiff in *Dresser* contracted silicosis, a lung disease, after working for Tyler Pipe Industries for eight years. The plaintiff brought a third-party suit against the company that manufactured the silica, and the case was submitted to the jury on a strict liability theory. The jury found that Dresser's failure to warn of the danger rendered the silica unreasonably dangerous as marketed.[159] The court of appeals affirmed and held that the trial court properly excluded evidence regarding the employer's conduct to support the defendant manufacturer's sole cause defense and properly denied the sole cause instruction.[160] The court of appeals also held that "contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence."[161] The Texas Supreme Court has granted writ of error to consider whether the failure to give a sole cause instruction or to exclude that evidence relating to the contributory negligence issue was harmful error.[162]

Karisch v. Allied-Signal, Inc.[163] and *Johnson v. Machine Ice Co.*[164] both discussed whether equipment was an improvement to realty or a component part which in turn determined whether the ten year statute of repose applied or the two year statute of limitation. In *Karisch*, the Corpus Christi court of appeals determined that a heat exchanger installed in an oil refinery was an improvement to realty rather than a component part, and thus the ten year statute of repose applied.[165] The court of appeals reasoned that since the heat exchanger was large in size, was difficult to move, and had been in continuous use and existence in the same place for twenty-two years, it was an improvement to the realty.[166] Yet in *Johnson*, a Houston court of appeals reversed summary judgment holding that a fact issue existed as to whether the equipment was a component part since the item could be moved.[167]

Hernandez v. American Appliance Manufacturing Corp.[168] was a wrongful death case where the court of appeals upheld the jury's findings that the

156. 821 S.W.2d 406 (Tex. App.—Tyler 1991, writ granted).
157. 658 S.W.2d 561 (Tex. 1983).
158. *Id.* at 562.
159. *Dresser*, 821 S.W.2d at 407.
160. *Id.* at 408.
161. *Id.* at 407-08 (quoting McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 790 (Tex. 1967)).
162. 35 Tex. Sup. Ct. J. 1129 (Sept. 16, 1992).
163. 837 S.W.2d 679 (Tex. App.—Corpus Christi 1992, n.w.h.).
164. 820 S.W.2d 850 (Tex. App.—Houston [14th Dist.] 1991, writ denied).
165. *Karisch*, 837 S.W.2d at 681; see TEX. CIV. PRAC. & REM. CODE ANN. § 16.009(a) (Vernon 1986).
166. 837 S.W.2d at 681.
167. *Johnson*, 820 S.W.2d at 852-53.
168. 827 S.W.2d 383 (Tex. App.—Corpus Christi 1992, writ denied).

deceased was ninety percent negligent.[169] The deceased was fatally injured when the pilot light of a water heater ignited the vapors of the adhesive glue he was working with. The court of appeals reasoned that the evidence supported the finding that the decedent knew he was taking a risk by using adhesives near a water heater without extinguishing the pilot light.[170] The court of appeals distinguished this case because it involved a patent defect known to the decedent as opposed to those cases involving latent defects not known to plaintiffs.[171]

Finally, in *Anderson v. Hodge Boats & Motors, Inc.*[172] the Beaumont court of appeals held that a defendant corporation that had been dissolved before the accident, and more than three years before the suit was filed, was entitled to summary judgment.[173] The court held that this case did not violate the open court's doctrine because a post dissolution claim has never been recognized in Texas and no statutory grant of such relief exists.[174]

D. EVIDENTIARY MATTERS

In *Cantrell v. Hennessy Industries, Inc.*[175] the Tyler court of appeals held that the trial court committed reversible error by limiting plaintiff's discovery to only those documents relating to the same model machine that caused the injury.[176] In this products liability case involving a tire changing machine, the plaintiff alleged that a pressure-limiting device was technologically available years before the tire changing machine was manufactured. The trial court, however, limited discovery to documents regarding the same model of machine with the same manufacture date or within five years prior to it, thus excluding evidence of pressure-limiting devices used on other tire-changing machines made by the same manufacturer. Since the issue of whether a safer design is suitable for one machine and adaptable to another is a question of feasibility to be decided by the jury, such discovery was relevant and the trial court abused its discretion by prohibiting it.[177]

In a unanimous decision, the Texas Supreme Court in *Lear Siegler, Inc. v. Perez*[178] held that a worker's death was too remotely connected to any product defect to constitute a cause of action against its manufacturer.[179] In this case, a sleeping driver hit a flashing mobile traffic sign which killed a highway worker. The worker's family sued the mobile sign manufacturer alleging that the sign had malfunctioned at the time of the accident as it had done previously that day. There was no evidence that the signal would have alerted a driver who was asleep. The court recognized there may be cases in

169. *Id.* at 385.
170. *Id.* at 391.
171. *Id.* at 392; *see* Keen v. Ashot Ashkelon, Ltd., 748 S.W.2d 91 (Tex. 1988).
172. 814 S.W.2d 894 (Tex. App.—Beaumont 1991, writ denied).
173. *Id.* at 896.
174. *Id.*; *see* TEX. CONST. art. I, § 13.
175. 829 S.W.2d 875 (Tex. App.—Tyler 1992, writ denied).
176. *Id.* at 877.
177. *Id.*
178. 819 S.W.2d 470 (Tex. 1991).
179. *Id.* at 472.

which a product defect exposes another to an increased risk of harm, but concluded the circumstances in this case were too attenuated and thus summary judgment was proper.[180]

IV. DAMAGES

A. ACTUAL DAMAGES

In *Hill v. Clayton*[181] the Corpus Christi court of appeals reversed an award of $2,500.00 for physical pain and mental anguish, medical care, loss of earning capacity, physical impairment, and disfigurement resulting from a gunshot wound apparently because the award was against the great weight and preponderance of the evidence.[182] The plaintiff had introduced uncontroverted expert testimony that the reasonable and necessary medical expenses resulting from the shooting were $8,939.00. The jury awarded the plaintiff $2,500.00 in damages and apportioned liability equally between the plaintiff and defendant. Although the amount of damages to be awarded is left to the sound discretion of the jury, the court of appeals concluded that "the jury cannot ignore the undisputed facts and arbitrarily fix an amount that is neither authorized nor supported by the evidence."[183]

In a personal injury case, future damages are within the jury's province to resolve.[184] Relying on *Gulf States Utilities Co. v. Dryden*,[185] the Fort Worth court of appeals in *Pipgrass v. Hart*[186] held that a large jury award does not indicate an improper award, since future damages of lost earning capacity may be based on common knowledge and a sense of justice.[187] The court of appeals reasoned that "no precise evidence is required to support an award of future medical damages, and a jury may base an award upon the nature of the injuries incurred together with the medical treatment rendered, and the injured party's condition at trial."[188] In this case, although there was no direct evidence of the injury's effect on the plaintiff's future income and future medical costs, the court of appeals affirmed the award of substantial future damages.[189]

B. MENTAL ANGUISH

Hyler v. Boytor[190] was a personal injury case in which the jury awarded the plaintiff damages for past loss of earning capacity, past physical impairment, and past and future medical expenses, but did not award damages for

180. *Id.*
181. 827 S.W.2d 570 (Tex. App.—Corpus Christi 1992, n.w.h.).
182. *Id.* at 574.
183. *Id.*; *see* Gray v. Floyd, 783 S.W.2d 214, 217 (Tex. App.—Houston [1st Dist.] 1990, no writ); Clark v. Brewer, 471 S.W.2d 639, 642 (Tex. App.—Corpus Christi 1971, no writ).
184. Pipgrass v. Hart, 832 S.W.2d 360 (Tex. App.—Fort Worth 1992, writ denied).
185. 735 S.W.2d 263, 268 (Tex. App.—Beaumont 1987, no writ).
186. 832 S.W.2d 360.
187. *Id.* at 366.
188. *Id.*
189. *Id.* at 363.
190. 823 S.W.2d 425 (Tex. App.—Houston [1st Dist.] 1992, no writ).

pain and suffering or mental anguish.[191] The plaintiff appealed arguing that the jury's award of no damages for physical pain and mental anguish was manifestly unjust and against the great weight and preponderance of the evidence and that such damages were established as a matter of law. The court of appeals affirmed, relying on *Blizzard v. Nationwide Mutual Fire Insurance Co.*,[192] which distinguished between subjective injuries and objective injuries.[193] The court concluded that the jury award of zero damages must be upheld if the indicia of injury is more subjective than objective.[194] The holding in this case suggests that when the evidence of injury is subjective, a jury's award of zero damages for pain and suffering and mental anguish will be upheld. If the evidence supporting an injury is objective, then a jury's award of zero damages will be against the great weight and preponderance of the evidence.

Similarly, the El Paso court of appeals held in *Worsham Steel Co. v. Arias*[195] that evidence to support a wrongfully discharged employee's claim for mental anguish was factually insufficient.[196] The employee brought suit alleging he was wrongfully discharged for asserting a worker's compensation claim. The jury awarded him $1,243,000 in both actual and exemplary damages.[197] The court of appeals reversed, stating that a recovery for mental anguish "is warranted in such cases where the plaintiff's mental pain has risen to such a level that it has rendered him incapable of dealing with certain everyday activities."[198] The court reasoned that although the evidence showed that the plaintiff was "very sad", there was no evidence of pain, distress, anguish, grief, or the like which would support an award for mental anguish.[199]

In a suit for damages for intentional infliction of emotional distress and mental anguish arising from a wrongful foreclosure and eviction, the El Paso court of appeals upheld the jury's findings in *LaCoure v. LaCoure*.[200] In *LaCoure*, the wife was awarded sole possession of a house when the couple divorced.[201] The husband's father wrongfully evicted the wife based on the husband's default on a backdated note and deed of trust that had been filed after the divorce. The court of appeals found sufficient evidence that the father engaged in intentional or reckless conduct that was extreme and outrageous and caused the wife severe mental distress.[202] The court reasoned that because there were no objective standards to measure mental anguish damages, the amount of such damages should be left to the jury's

191. *Id.*
192. 756 S.W.2d 801, 805 (Tex. App.—Dallas 1988, no writ).
193. 823 S.W.2d at 427.
194. *Id.* at 428.
195. 831 S.W.2d 81 (Tex. App.—El Paso 1992, no writ).
196. *Id.* at 87.
197. *Id.* at 82.
198. *Id.* at 86.
199. *Id.* at 87.
200. 820 S.W.2d 228 (Tex. App.—El Paso 1991, writ denied).
201. *Id.* at 232.
202. *Id.* at 233-34.

discretion.[203]

The Supreme Court of Texas, in *Boyles v. Kerr*,[204] held that Texas law does not recognize a cause of action for negligent infliction of emotional distress. This highly publicized case was based upon a videotape made without Ms. Kerr's knowledge, which showed her engaging in sexual intercourse with Mr. Boyles. At trial, the jury awarded Ms. Kerr monetary damages and the court of appeals affirmed.[205] The Texas Supreme Court reversed and remanded the case for a new trial reasoning that Kerr could not recover based on the jury verdict because

> the tort system can and does provide a remedy against those who engage in such conduct. But an independent cause of action for negligent infliction of emotional distress would encompass conduct far less outrageous than that involved here, and such a broad tort is not necessary to allow compensation in a truly egregious case such as this.[206]

Boyles overruled *St. Elizabeth Hospital v. Garrard*,[207] which recognized an independent right to recover for negligently inflicted emotional distress. The Texas Supreme Court further held that it was not limiting the right to recover mental anguish damages in other contexts such as a breach of some other duty imposed by law.[208]

The El Paso court of appeals, in *Crites v. Peitila*,[209] held that parents have a common law negligence claim for mental anguish damages based on the death of a fetus. In this case, the mother was eight months pregnant when she was involved in a car accident. After being treated for injuries, the mother was released from the hospital. The next day she visited her obstetrician. There she was given a sonogram, which determined the baby was dead. The trial court granted summary judgment for the doctors, and the parents appealed. The court of appeals reversed and remanded for trial holding Texas law recognizes such a claim for mental anguish.[210]

More recently, the Dallas court of appeals in *Exxon Corp. v. Tidwell*[211] held that mental anguish damages are not recoverable by a person who is not a bystander. Terry Tidwell was shot while working at a gas station. His mother arrived shortly after the shooting and saw him in the ambulance. Terry and his mother sued Exxon and obtained a judgment against Exxon that included mental anguish damages for the mother. The appellate court denied recovery for mental anguish of a non-bystander. Tidwell argued on appeal that since bystander status was not necessary for recovery in a claim for loss of consortium, nor was it necessary for recovery in a claim for negligent infliction of emotion distress. The court rejected the argument because

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203. *Id.* at 234.
204. 36 Tex. Sup. Ct. J. 231 (Dec. 5, 1992).
205. 806 S.W.2d 255, 261 (Tex. App.—Texarkana 1991), *rev'd*, 36 Tex. Sup. Ct. J. 231 (Dec. 5, 1992).
206. 36 Tex. Sup. Ct. J. at 237.
207. 730 S.W.2d 649 (Tex. 1987).
208. 36 Tex. Sup. Ct. J. 235-238 (Dec. 5, 1992).
209. 826 S.W.2d 176 (Tex. App.—El Paso 1992, n.w.h.).
210. *Id.*
211. 816 S.W.2d 455 (Tex. App.—Dallas 1991, writ granted).

a claim for loss of consortium does not include an element of mental anguish.[212]

C. EXEMPLARY DAMAGES

The El Paso court of appeals, in *Goswami v. Thetford*,[213] held that a punitive damage award of $95,000.00 was not excessive even though the actual damages were $5,000.00.[214] *Goswami* was a sexual harassment and assault case in which a new employee was subjected to unwanted sexual advances, including kissing and touching. The jury found that the defendant's conduct was extreme and outrageous, and awarded the punitive damages. The court stated that the purpose of exemplary damages is to deter the wrongdoer and prevent future harms of the same nature. When a jury honestly tries to set an amount which punishes a wrongdoer, and does not oppress him, the judgment should not be disturbed by the appellate courts.[215] The court reasoned that whether the amount is excessive is a question of fact and depends on the surrounding circumstances of each case and will be set aside only if the evidence indicates that the exemplary damages were the result of passion or prejudice or that the evidence had been disregarded by jury.[216] The court held that the punitive damages, which were nineteen times the amount of the actual damages, were not excessive because the defendants' conduct was of such a nature that our society has rightfully moved to denounce them.[217]

In *Transmission Exchange, Inc. v. Long*[218] a customer sued an automobile transmission repair shop alleging fraud and deceptive practices. The trial court entered judgment for the customer in the amount of $512.00 actual damages and $30,000.00 punitive damages.[219] The repair shop argued on appeal that the award of punitive damages was improper because evidence was insufficient.[220] The court applied the facts of this case to Chapter 41 of the Texas Civil Practices and Remedies Code,[221] which expressly puts no limit on exemplary damages resulting from an intentional tort.[222] Since this case was an action for fraud, an intentional tort, the court reviewed the award under the principals of common law.[223] The court found that the evidence was sufficient and upheld the award of punitive damages.[224]

In *Transportation Insurance Co. v. Moriel*[225] however, the Texas Supreme Court granted writ to consider an exemplary award of $1,000,000.00. The

212. *Id.* (relying on Reagan v. Vaughn, 804 S.W.2d 463, 466 (Tex. 1990)).
213. 829 S.W.2d 317 (Tex. App.—El Paso 1992, writ denied).
214. *Id.* at 318.
215. *Id.* at 321.
216. *Id.* (citing Aetna Casualty & Surety Co. v Joseph, 769 S.W.2d 603, 607 (Tex. App.—Dallas 1989, no writ)).
217. *Id.*
218. 821 S.W.2d 265 (Tex. App.—Houston [1st Dist.] 1991, writ denied).
219. *Id.* at 268.
220. *Id.* at 272.
221. TEX. CIV. PRAC. & REM. CODE, Chapter 41 (Vernon Supp. 1991).
222. *Id.* § 41.008.
223. 821 S.W.2d at 272.
224. *Id.* at 273.
225. 814 S.W.2d 144 (Tex. App.—El Paso 1991, writ granted).

court will consider whether the punitive damages in this worker's compensation case violated Chapter 41 of the Texas Civil Practice & Remedies Code and whether the award violates the due process clauses of the United States and Texas Constitutions.[226]

In *Transportation Insurance* the insurance carrier contended that Texas law on punitive damages is impermissibly vague and thus violates their due process rights regarding a punitive damages award. The appeals court affirmed the judgment, relying on the United States Supreme Court decision in *Pacific Mutual Life Insurance Co. v. Haslip*,[227] which set forth factors to be considered by the courts in reviewing punitive damages awards.[228] Similarly, the court of appeals, in *Texas Employers Insurance Association v. Puckett*,[229] reasoned that since jury instructions expressly described the purpose of punitive damages and also listed factors the jury could consider in determining the amount of such damages, then under either Texas law or the *Haslip* decision, a carrier's due process rights were not violated.[230]

D. PRE-JUDGMENT INTEREST

The Fort Worth court of appeals, in *General Life & Accident Insurance Co. v. Higginbotham*,[231] upheld a pre-judgment interest award of six percent per year on trebled damages due under an insurance contract.[232] According to Texas Revised Civil Statutes Annotated article 5069-1.05, a rate of ten percent per year applies to mental anguish damages when an insurance contract does not set a formula by which that sum can be ascertained with reasonable certainty.[233] The court explains that the six percent rate provided for in Texas Revised Civil Statutes Annotated art. 5069-1.03 applies to amounts due under the policy and the statutory trebling of those damages.[234]

V. CONTRIBUTION, INDEMNITY, AND SETTLEMENT

In *Shoemake v. Fogel, Ltd.*,[235] the Texas Supreme Court held that a claim for contribution against the parent by the defendant is barred by the doctrine of parental immunity.[236] In this case, the child nearly drowned in a swimming pool at her apartment complex, but was rescued and temporarily revived only to die four months later from the injuries. The mother brought an action in her own capacity against the apartment complex for wrongful death and a survival action in her capacity as representative of the child's

226. *Id.*
227. 111 S. Ct. 1032 (1991).
228. *Id.* at 1044-46.
229. 822 S.W.2d 133 (Tex. App.—Houston [1st Dist.] 1991, writ denied).
230. *Id.* at 142.
231. 817 S.W.2d 830 (Tex. App.—Ft. Worth 1991, writ denied); see TEX. REV. CIV. STAT. ANN. art. 5069-1.05 (Vernon 1987).
232. *Id.* at 833-34.
233. *Id.* at 834 (relying on TEX. REV. CIV. STAT. ANN. art. 5069-1.05 (Vernon 1987)).
234. *Id.*
235. 826 S.W.2d 933 (Tex. 1992).
236. *Id.* at 935.

estate. Considering the negligence that caused the death, the jury attributed fifty-five percent to the apartment and the remaining forty-five percent to the mother.[237] In the wrongful death action, the trial court reduced the mother's recovery by forty-five percent, yet rendered judgment on their survival action in the full amount of the jury verdict.[238] Relying on *Felderhoff v. Felderhoff*[239] and *Jilani v. Jilani*,[240] the court in *Shoemake* held that parental immunity does not extend to suits arising in the course of the parent's business activities or to automobile tort actions.[241] In cases involving the management, supervision and control of a minor, the defense of parental immunity is preserved even if it is not specifically pled because such a defense is apparent on the face of the petition and is established as a matter of law.[242] Since the minor's cause of action against her parent is barred by the doctrine of parental immunity, the apartment complex, which was a joint tortfeasor, had no right to contribution against the mother.[243]

The San Antonio court of appeals in *USX Corporation v. Salinas*[244] held that where there is no evidence that a retailer was independently culpable with respect to the product in question, the retailer is entitled to indemnity from the wholesale distributor and manufacturer of an oil rig elevator.[245] The court reasoned that while the common law doctrine of indemnity between joint tortfeasors in strict liability cases was implicitly abolished in *Duncan v. Cessna Aircraft Co.*,[246] an indemnity right survives in product liability cases to protect the innocent retailer in the chain of distribution.[247] Since the record did not show any evidence that USX was independently culpable, then as an innocent retailer USX was entitled to indemnity.[248]

During the Survey period, the Texas Supreme Court decided two cases which addressed the various contribution and comparative causation schemes in Texas. In *Stewart Title Guaranty Co. v. Sterling*[249] a developer bought a tract of land to develop a residential subdivision and received assurances from the seller, the attorneys, and the title company that three improved lots were included in the sale. After the sale, the developer learned that he had not received good title to the three improved homesites. The developer brought suit for violations of the Insurance Code, DTPA, negligence, gross negligence, and fraud.[250] The seller and attorneys settled for $400,000, and the case proceeded against the title company alone. The jury awarded the developer $200,000 in actual and consequential damages, find-

237. *Id.*
238. *Id.*
239. 463 S.W.2d 928, 933 (Tex. 1971).
240. 767 S.W.2d 671, 673 (Tex. 1988).
241. 826 S.W.2d 933, 935.
242. *Id.* at 937.
243. *Id.* at 938.
244. 818 S.W.2d 473 (Tex. App.—San Antonio 1991, writ denied).
245. *Id.* at 489-90.
246. 665 S.W.2d 414 (Tex. 1984).
247. 818 S.W.2d at 489.
248. *Id.* at 490.
249. 822 S.W.2d 1 (Tex. 1991), *modified*, 35 Tex. Sup. Ct. J. 316 (Dec. 11, 1991).
250. *Id.* at 4.

ing that the title company knowingly engaged in improper trade practices.[251] The developer elected to recover under the insurance code, trebling the damage award. The court of appeals revived the "one satisfaction rule" of *Bradshaw v. Baylor University*[252] and permitted the title company to receive a dollar for dollar credit[253] under the original contribution statute.[254] The court stated that this rule would be applied only when there is one indivisible harm and that since the developer suffered the single injury of failure to obtain good title, then the trebled award of $600,000 should be offset by the $400,000 paid in settlement.[255] The court applied a post trebling credit to give effect to the clear punitive purpose of the penal provisions.[256] Justice Doggett, joined by Justices Mauzy and Gammage, wrote a dissent arguing that the majority had awakened a "dead tort principle to roam the land terrorizing victims."[257] The dissent argued that the one satisfaction rule espoused in *Bradshaw* had previously been pronounced dead in *Duncan v. Cessna Aircraft Co.*[258] The dissent further mourned that the majority's decision confers a windfall to wrongdoers, discourages settlement and "[a]s in The Night of the Living Dead, an unthinkable zombie is raised to prey on the living."[259]

In *Gold Kist, Inc. v. Texas Utilities Electric Co.*,[260] Texas Utilities requested a dollar for dollar credit for the amount paid by the other settling defendant.[261] The trial court rejected Texas Utilities' dollar for dollar credit election and applied a proportional reduction of Texas Utilities' liability.[262] The court of appeals held that Texas Utilities was entitled to a dollar for dollar credit.[263] The supreme court reversed holding that this case was governed by the pre-1987 comparative negligence statute.[264] The supreme court reasoned that nothing in the pre-1987 statute gave the non-settling defendant the exclusive right to elect the type of credit it receives, and the credit is determined solely by the submission of the settling defendant's negligence to the jury regardless of who requests the submission.[265] Relying on *Duncan* the court noted that both the benefits and the risks of settlement should rest with the plaintiff.[266]

Finally, the Texas Supreme Court has abolished Mary Carter agreements.

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251. *Id.*
252. 84 S.W.2d 703 (Tex. 1935).
253. 822 S.W.2d at 5-6.
254. *Id.* (discussing TEX. CIV. PRAC. & REM. CODE ANN. § 32.001).
255. *Id.* at 9.
256. *Id.*
257. Stewart Title Guar. Co. v. Sterling, 822 S.W.2d 1, 12 (Tex. 1991) (Doggett, J., dissenting).
258. 665 S.W.2d 414 (Tex. 1984).
259. 822 S.W.2d at 12.
260. 830 S.W.2d 91 (Tex. 1992).
261. *Id.* at 92.
262. *Id.*
263. *Id.*
264. *Id.* at 93-94 (citing TEX. CIV. PRAC. & REM. CODE §§ 33.014 and 33.015).
265. *Id.* at 94.
266. *Id.*

In *Elbaor v. Smith*[267] the court announced that Mary Carter agreements are void as against public policy.[268] The court stated that a Mary Carter agreement exists when the settling defendant retains a financial stake in the plaintiff's recovery and remains a party at the trial of the case.[269] The court reasoned that Mary Carter agreements inflict both procedural and substantive damage upon our adversarial system and violate sound public policy.[270] The court went on to say that this holding was applicable only to this case, those cases "in the judicial pipeline where error has been preserved," and to those actions tried on or after December 2, 1992.[271] The court concluded that a settling defendant may not participate in the trial in which he retains a financial interest in the plaintiff's lawsuit.[272]

VI. STATUTE OF LIMITATIONS AND REPOSE

A. WRONGFUL DEATH AND NEGLIGENCE ACTIONS

The Texas Supreme Court held that a wrongful death cause of action, filed thirty-six days after the plaintiff died, was barred by the statute of limitations in *Russell v. Ingersoll-Rand Co.*[273] The decedent was diagnosed with chronic obstructive pulmonary disease caused by exposure to silica during his employment as a sandblaster. In 1982, he sued several defendants involved in the manufacturing and distribution of the product he used during his employment. Five weeks after the decedent died in 1988, his widow and children amended his petition, adding their wrongful death claims and adding seven new defendants. The Texas Supreme Court affirmed summary judgment as to the new defendants on the grounds that the claims were barred by the statute of limitations.[274] The court reasoned that limitations for wrongful death cases begin to run when the fact of the injury is known, regardless of whether the plaintiff has actually died.[275] Thus, the widow's and children's wrongful death cause of action against those defendants added after Russell's death were barred by limitations.[276] In order to file a timely wrongful death cause of action, Russell would have had to file all claims against any defendants within two years of the date that the fact of injury is known.[277]

When multiple actions are based on the same wrongful conduct and an individual's action for personal injuries would have been barred by limitations at the time of his death, then actions brought by his heirs or estate

267. 845 S.W.2d 240 (Tex. 1992).
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.*
273. 841 S.W.2d 343 (Tex. 1992).
274. *Id.*
275. *Id.*
276. *Id.* at 352.
277. *Id.* at 344 n.3; *see also* Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 351 (Tex. 1990) (discussing the discovery rule).

under the survival statute[278] and by his beneficiaries under the wrongful death statute[279] are also barred by limitations.[280] In reaching this conclusion, the court reasoned that since a decedent's actions would have been barred by limitations had it been asserted immediately prior to his death, all derivative claims based on he same alleged wrong is likewise barred.[281] The court rejected the plaintiff's argument that a wrongful death action does not accrue until the death of the injured person under Section 16.003(b) of the Civ. Prac. & Rem. Code.[282] The court reasoned that this section applies if a wrongful death action exists, but if a wrongful death action does not exist because the decedent could not maintain an action in his own right immediately prior to his death, then no wrongful death action ever accrues.[283]

In *Flores v. Lively*[284] the Corpus Christi court of appeals held that a wife's cause of action against her husband for negligent transmission of genital herpes accrued when she became aware that she had the disease.[285] The couple were married in 1981, and in 1982 Flores was diagnosed with genital herpes. Lively was diagnosed with the disease in 1983, and in 1989 they divorced. Flores argued that the trial court erred in entering judgment in favor of Lively because her claim is barred by limitation. The court of appeals agreed holding that Lively's cause of action accrued when she became aware that she had the disease, in 1983.[286] Lively argued that her cause of action did not begin to accrue until 1987, when the Texas Supreme Court abolished the common law defense of interspousal immunity in *Price v. Price*.[287] The court of appeals rejected this argument reasoning that *Price* "did not create a new cause of action; it abolished a defense".[288]

B. Medical Malpractice — Statute of Limitations

In *Rowntree v. Hunsucker*[289] a patient and her husband brought a medical malpractice suit against a physician for failing to diagnose an injury causing condition. On October 24, 1985, Dr. Rowntree examined the plaintiff and prescribed medication for hypertension. Throughout the next two years, plaintiff had her blood pressure checked by Dr. Rowntree's nurses. On May 22, 1987 plaintiff telephoned, requesting a refill of her hypertension medication. She did not express any complaints or receive any medical advice at that time. She was given a prescription authorizing five refills or a six month supply. On January 5, 1988, plaintiff suffered a debilitating stroke due to an occluded carotid artery. In October 1989 the plaintiff sued Dr. Rowntree for

278. Tex. Civ. Prac. & Rem. Code § 71.021 (Vernon 1986 & Supp. 1993).
279. Tex. Civ. Prac. & Rem. Code §§ 71.001-011 (Vernon 1986 & Supp. 1993).
280. 841 S.W.2d at 343.
281. *Id.* at 345.
282. Tex. Civ. Prac. & Rem. Code § 16.003(b) (Vernon 1986 & Supp. 1993).
283. 841 S.W.2d at 350.
284. 818 S.W.2d 460 (Tex. App.—Corpus Christi 1991, writ denied).
285. *Id.* at 462.
286. *Id.*
287. 732 S.W.2d 316 (Tex. 1987).
288. 818 S.W.2d at 462.
289. 833 S.W.2d 103 (Tex. 1992).

negligently failing to diagnose, monitor and otherwise properly treat the occluded artery.

The trial court granted summary judgment on the basis of limitations and the Texas Supreme Court affirmed.[290] The limitations begin to run on "(1) the occurrence of the breach or tort; (2) the date the health care treatment that is the subject of the claim is completed; or (3) the date the hospitalization for which the claim is made is completed."[291] The statute of limitations begins to run on the precise date of the specific breach or tort, if it is ascertainable from the facts of the case.[292] If the " 'injury occurs during a course of treatment for a particular condition and the only readily ascertainable date is the last day of treatment,' " then the statute of limitation begins to run on that date.[293] If the course of a drug treatment is the direct cause of the injury, the period begins to run on the date of the last drug treatment.[294] Similarly, if the defendant instituted an improper course of treatment based on misdiagnosis, the statute begins to run on the last date of the treatment.[295]

In *Rowntree*, the Texas Supreme Court could not determine as a matter of law that the ongoing treatment for high blood pressure was not treatment for the condition that was the basis of plaintiffs' claim.[296] Accordingly, the statute of limitations began to run on the date of the patient's last visit to the doctor's office, not the date of last prescription refill for high blood pressure.[297]

In *Conaway v. Chambers*[298] the Texarkana court of appeals reversed the trial court's order granting summary judgment in favor of the doctor. In this case, the doctor performed a breast examination and a mammography in June of 1986 and found no cancerous condition. That was the last date that the patient saw the doctor for her breast condition. Over the past two years, however, the doctor saw the patient on at least six occasions for unrelated visits. In May 1988, the plaintiff was diagnosed with breast cancer and a mastectomy was performed a week later. The patient filed suit in January, 1989.

The court of appeals reversed summary judgment on the ground that a material issue of fact existed as to whether the doctor was still treating the patient for the breast condition at the time of her later office visits.[299] In the event that a wrongful act is of a continuing nature, a plaintiff "has a new cause of action each time a wrongful act occurs."[300] Accordingly, the limi-

290. *Id.*
291. *Id.* at 104 (citing Kimball v. Brothers, 741 S.W.2d 370, 372 (Tex. 1987)).
292. *Id.* at 105 (citing *Kimball*, 741 S.W.2d at 372).
293. *Id.* (quoting *Kimball*, 741 S.W.2d at 372).
294. *Id.*
295. *Id.* (citing *Kimball*, 741 S.W.2d at 372).
296. *Id.* at 106-8.
297. *Id.* at 108.
298. 823 S.W.2d 331 (Tex. App.—Texarkana 1991, writ granted).
299. *Id.* at 335.
300. *Id.* at 334.

tation period begins to run when each wrongful act occurs.[301]

In *Parker v. Yen*[302] the plaintiff sued a pharmacist and pharmacy for misfilling a prescription with the wrong medicine. The trial court granted summary judgment for both defendants, and the plaintiff appealed. The court of appeals held that material issues of fact exist as to when consumers knew or should have known of alleged deceptive acts giving rise to breach of the Texas Deceptive Trade Practices Act;[303] the limitation was tolled on the medical malpractice claim against the pharmacist by giving written notice pursuant to Article 4590(i) of the Texas Revised Civil Statutes;[304] and the negligence action for personal injuries accrued on the date the customer was injured as a result of ingesting the misfilled prescriptions.[305]

Finally, in *Gandara v. Slade*[306] the Austin court of appeals held that a doctor is not entitled to summary judgment based on the two year statute of limitations[307] when material issues of fact exist as to whether the plaintiffs or the deceased knew or reasonably should have known of the doctor's negligence more than two years before the suit was filed.[308] The court reasoned that application of the two year statute of limitations in this case violated the open court's provision of the Texas Constitution[309] by foreclosing the plaintiff's cause of action before they should have known it existed. The deceased was examined by the doctor in April 1985. In August 1988, she was notified that the blood donor from whom she had received blood during surgeries had the HIV antibody. She died from AIDS in January 1990. Her parents sued the doctor in February, 1991 alleging that he was negligent in April, 1985. The court held that the fact that the plaintiffs learned that their daughter had the AIDS virus in 1988 was irrelevant, since the doctor's alleged negligence arose from misdiagnosis rather than from the transfusion.[310]

C. LEGAL MALPRACTICE — STATUTE OF LIMITATIONS

The Texas Supreme Court heard three significant cases during the Survey period that addressed the issue of when a cause of action for legal malpractice accrues. In *Hughes v. Mahaney & Higgins*[311] the plaintiffs sued their former attorneys for malpractice in connection with adoption of a child. The trial court granted the attorney's motion for summary judgment. The court of appeals affirmed the trial court's summary judgment, holding that the malpractice action accrued at the time of the alleged malpractice, rather

301. *Id.*
302. 823 S.W.2d 359 (Tex. App.—Dallas 1991, n.w.h.).
303. *Id.* at 363.
304. *Id.*
305. *Id.* at 364.
306. 832 S.W.2d 164 (Tex. App.—Austin 1992, n.w.h.).
307. *Id.* at 166 (discussing TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon 1992)).
308. *Id.* at 167.
309. *Id.* at 166; *see* Neagle v. Nelson, 685 S.W.2d 11, 12 (Tex. 1985); *see also* TEX. CONST. art. I, § 13.
310. 832 S.W.2d at 167.
311. 821 S.W.2d 154 (Tex. 1991).

than at the time of the court of appeals' decision.[312] The Texas Supreme Court reversed the judgment and remanded the case to the trial court.[313] The court held that the statute of limitations was tolled until all of the Hughes' remedies in the underlying action were exhausted.[314] The court reasoned that this tolling is necessary in any case in which an attorney commits malpractice "during the attorney's prosecution or defense of a claim that results in litigation."[315] Without tolling, the Hughes would be required to take inherently inconsistent positions in the underlying action and the malpractice case.[316] The court stated that in this case, the Hughes originally claimed that the attorney committed malpractice in handling their adoption suit, but in appealing the adoption suit, they had to argue that the attorney's actions were correct or at least not fatal to their claims.[317] The likelihood of the Hughes' success in both suits would have been compromised had they been required to take such inconsistent positions.[318] Accordingly, the statute of limitations on the Hughes' malpractice claim was tolled from the time the cause of action accrued until all remedies were exhausted.[319]

Aduddell v. Parkhill,[320] decided on the same day as *Hughes*, addressed the question of whether a legal malpractice action based on an attorney's failure to file an action within the statute of limitations accrues on the date the action should have been filed or on the date the action was dismissed.[321] In *Aduddell*, the plaintiff was diagnosed as having asbestosis on April 24, 1983. On May 20, 1985 his attorney filed a lawsuit in federal court against several asbestos manufacturers.[322] The federal district court held the suit was barred by the two year statute of limitation, and the plaintiff appealed that judgment to the Fifth Circuit Court of Appeals, which affirmed the district court's judgment.[323] The United States Supreme Court denied writ of certiorari in February, 1988.[324] On June 22, 1988, the plaintiff filed this malpractice suit against the attorneys who filed the asbestos suit.[325] The trial court granted summary judgment for the attorneys, holding that the suit was barred by the two year statute of limitations.[326] The court of appeals affirmed.[327] The Texas Supreme Court retroactively applied *Hughes* and reversed and remanded the case to the trial court for further proceedings.[328] Like *Hughes*, the court held that the statute of limitations was tolled until all

312. *Id.* at 156.
313. *Id.* at 158.
314. *Id.* at 157.
315. *Id.*
316. *Id.* at 156.
317. *Id.* at 157.
318. *Id.*
319. *Id.* at 158.
320. 821 S.W.2d 158 (Tex. 1991), *cert. denied*, 112 S. Ct. 2998 (1992).
321. *Id.* at 159.
322. *Id.* at 158.
323. *Id.*
324. *Id.*
325. *Id.*
326. *Id.*
327. *Id.*
328. *Id.*

remedies of the underlying claim were exhausted.[329]

In a per curiam opinion, the Texas Supreme Court, in *Gulf Coast Investment Corp. v. Brown*,[330] extended the tolling rule announced in *Hughes* to cases in which an attorney's malpractice results in a wrongful foreclosure action by a third party against the client.[331] In this case, the client hired the attorneys to conduct a non-judicial foreclosure sale of property owned by third parties. After the sale, the third parties filed a wrongful foreclosure action against the client. After judgment was rendered against the client in the wrongful foreclosure action, the client filed this legal malpractice action against the attorneys.[332] The trial court granted the attorney's motion for summary judgment.[333] The court of appeals affirmed holding that the client's cause of action for legal malpractice accrued when the wrongful foreclosure action was filed.[334] The Texas Supreme Court, without hearing oral argument, held that the tolling rule espoused in *Hughes* and *Aduddell* should also be retroactively applied in a malpractice action resulting from a wrongful foreclosure claim by third-parties against the client.[335] The court reasoned that a malpractice claim is tolled until the wrongful foreclosure action is finally resolved.[336]

Finally, *American Medical Electronics, Inc. v. Korn*[337] applied the discovery rule to a legal malpractice claim. In this case, the company relied on an attorney's advice regarding patents and the shop-right doctrine. Based on the attorney's advice, the company assigned its rights in the patent to a consultant. The company consulted another law firm to obtain a second opinion after the consultant was issued a patent in 1987. The second law firm advised the company that if the issue were litigated, there was a substantial likelihood that a court would determine that the consultant owned the patent. In 1990, the consultant sued the company for patent infringement. The company then brought a malpractice action against the original attorneys who rendered advice on the patent. The trial court granted the summary judgment on the basis that the claim was time-barred.[338] The Dallas court of appeals held that legal malpractice sounds in tort and a two year limitation period applies.[339] Further, the court of appeals said that a cause of action for negligence accrues the moment the plaintiff is entitled to sue the defendant for damages.[340] Under the discovery rule, the limitation period is tolled until the plaintiff either discovers or reasonably should have discovered the damages.[341] Since the malpractice occurred when the company was

329. *Id.*
330. 821 S.W.2d 159 (Tex. 1991).
331. *Id.* at 160.
332. *Id.*
333. *Id.*
334. *Id.*
335. *Id.* at 160-61.
336. *Id.* at 160.
337. 819 S.W.2d 573 (Tex. App.—Dallas 1991, writ denied).
338. *Id.*
339. *Id.* at 576 (citing Willis v. Maverick, 760 S.W.2d 642, 644 (Tex. 1988)).
340. *Id.* at 577.
341. *Id.*

given the erroneous or incomplete legal advice and the company knew of the malpractice in 1987 when it consulted another law firm to obtain a second opinion, the two year period of limitation lapsed before the company brought suit in 1990.[342]

VII. TEXAS TORT CLAIMS ACT

A. INTENTIONAL TORT EXCEPTION

Delaney v. University of Houston[343] involved a student who was raped in her dormitory room at the University of Houston. The rapist had entered the dormitory through a door with a broken lock, which had been reported to dormitory management on a number of occasions. Delaney brought suit against the university for breach of contract, breach of express and implied warranties, negligence, and DTPA claims. The trial court granted summary judgment for the university, holding that the claims were barred by sovereign immunity since the Tort Claims Act does not apply to intentional torts.[344] The Texas Supreme Court reversed and remanded the case to trial reasoning that Section 101.057(2) of the Texas Tort Claims Act should not be read so narrowly as to exempt from the waiver of immunity any claim, irrespective of its nature, for injuries resulting from an intentional tort.[345] Relying on *Nixon v. Mr. Property Management Co.*,[346] the court recognized that a negligent actor may be held responsible for the criminal acts of third-parties.[347]

B. USE OF TANGIBLE PROPERTY

In *Texas Department of Mental Health and Mental Retardation v. Petty*,[348] the Texas Supreme Court considered whether the government can be held responsible for injuries resulting from misdiagnosis and mistreatment during institutionalization in state facilities. Opal Petty was confined for fifty-one years at a MHMR facility with her diagnosis ranging over time from schizophrenic, mentally ill, not mentally ill, mildly mentally retarded, to not mentally retarded at all. Her treatment was never effected. Ms. Petty brought suit complaining she was wrongfully confined and that she suffered injury because continued misdiagnosis and improper treatment deprived her of an opportunity to function in society. The jury awarded damages to her in the amount of $505,000 and the trial court reduced the award to $250,000 under the Texas Tort Claims Act.[349] The court of appeals affirmed the judgment. The department argued that the institutional treatment records were not tangible property under the Texas Tort Claims Act.[350] The court, rely-

342. *Id.* at 578.
343. 835 S.W.2d 56 (Tex. 1992).
344. *Id.* at 57 (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001-.063).
345. *Id.* at 59.
346. 690 S.W.2d 546, 550 (Tex. 1985).
347. 835 S.W.2d at 59.
348. 36 Tex. Sup. Ct. J. 421 (January 5, 1993).
349. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 101.023(a)).
350. *Id.*

ing on its decisions in *Salcedo v. El Paso Hospital District*[351] and *Robinson v. Central Texas Mental Health and Mental Retardation Center*,[352] held that misreading and misinterpreting constituted the misuse of tangible property which will subject the government to liability just as if it were a private person.[353] In affirming the trial court and the court of appeals, the Texas Supreme Court concluded that the Tort Claims Act does not preclude recovery for injuries resulting from the negligent use of diagnostic records which are tangible property.[354]

Conversely, the Beaumont court of appeals, in *Jefferson County v. Sterk*,[355] held that an arrest warrant is not tangible personal property giving rising to a cause of action under the Texas Tort Claims Act.[356] This suit was brought after Sterk's picture was broadcast on the television production called CrimeStoppers, even though the warrant should have been withdrawn. Sterk brought suit under the Texas Tort Claims Act contending that the warrant was tangible personal property. The trial court found that the warrant was personal property and rendered judgment for Sterk in the amount of $25,000.[357] The court of appeals reversed the trial court and reasoned that since an arrest warrant cannot be handled, touched or seen by the plaintiff, it was not personal property for purposes of the act.[358]

C. Motor Vehicle Operation

LeLeaux v. Hamshire-Fannett Independent School District[359] involved a suit brought against the school district under the Texas Tort Claims Act by a student who hit her head on the rear door of a school bus as she entered it. At the time of the injury, the bus was not moving and the ignition was not engaged. The Texas Supreme Court affirmed summary judgment on the grounds that the waiver of sovereign immunity did not occur in this case since the bus was parked, the motor was off, the driver was not on board, and the bus was not being operated.[360]

D. Duty

In a suit alleging sovereign immunity the Texas Supreme Court, in *Fort Bend County Drainage District v. Sbrusch*,[361] held that the county did not owe a legal duty to the plaintiff.[362] In this case, the plaintiff was injured when the bridge he was driving on collapsed. The bridge was built by the

351. 659 S.W.2d 30 (Tex. 1983).
352. 780 S.W.2d 169, 170 (Tex. 1989).
353. 36 Tex. Sup. Ct. J. at 423.
354. *Id.* at 424.
355. 830 S.W.2d 260 (Tex. App.—Beaumont 1992, writ denied).
356. *Id.* at 263.
357. *Id.* at 261.
358. *Id.* at 263.
359. 835 S.W.2d 49 (Tex. 1992).
360. *Id.* at 51 (discussing Tex. Civ. Prac. & Rem. Code §§ 101.001(2)(B), 101.025, 101.051).
361. 818 S.W.2d 392 (Tex. 1991).
362. *Id.* at 397.

drainage district in return for an easement to construct a drainage channel. The jury assessed the district's negligence in causing the accident at sixty percent, but the trial court rendered judgment n.o.v. for the district.[363] The court of appeals reversed and rendered judgment on the verdict for the plaintiff.[364] The court of appeals reasoned that since the district had voluntarily assumed the duty to repair the bridge, they had the duty to exercise reasonable care to assure safety and that the manner in which a district repairs a bridge is not discretionary.[365] The Texas Supreme Court reversed the court of appeals reasoning that since the district's promise to repair the bridge was never communicated to the plaintiff, he could never have relied upon it.[366] Since the district neither created the dangerous condition nor assumed a duty to repair the bridge, the district cannot be held liable for the plaintiff's injuries.[367]

Finally, in *State Department of Highways v. Payne*,[368] the Texas Supreme Court held that an obscured and unmarked culvert was not a special defect requiring correction. By finding that the culvert was a premise defect, rather than a special defect, the duty imposed on the state was lower than if the culvert had been a special defect.[369] Because of the distinction, the court concluded that the plaintiff did not meet his burden of proving that the state knew of the defect and the plaintiff was unaware of its existence.[370]

VIII. OTHER AREAS OF CONCERN

A divided Texas Supreme Court declined to recognize the tort of "false light" in *Diamond Shamrock Refining v. Mendez*.[371] In this action, a discharged employee alleged that his employer committed the torts of "false light" invasion of privacy and intentional infliction of emotional distress by circulating information about his termination among his fellow employees. The jury found for *Mendez* on both the false light and intentional infliction of emotional distress counts awarding him $920,000 in damages. The court of appeals affirmed the judgment holding that the standard in false light cases is negligence rather than actual malice.[372] The Texas Supreme Court reversed and remanded on the basis that if the tort of false light exists in Texas, it requires a showing of actual malice as an element of recovery.[373] The first opinion, written by Chief Justice Phillips, concluded that the least objectionable alternative is to remand the case for a new trial without expressly deciding whether the false light tort exists in Texas, and giving the

363. *Id.* at 394.
364. *Id.*
365. Sbrush v. Fort Bend County Drainage Dist., 788 S.W.2d 896, 899 (Tex. App.—Houston [14th Dist.] 1990).
366. 818 S.W.2d at 397.
367. *Id.* at 398.
368. 838 S.W.2d at 235 (Tex. 1992).
369. *Id.* at 239.
370. *Id.* at 241.
371. 844 S.W.2d 198 (Tex. 1992).
372. *Id.* at 199.
373. *Id.* at 201.

plaintiff the opportunity to prove actual malice and the defendant the opportunity to object to the theory of recovery in its entirety.[374] In concurring opinions, several justices indicated that they may not even recognize the tort of false light regardless of the standard applied.[375] Justice Doggett, joined by Justices Mauzy and Gammage, dissented arguing that the Court's action was an assault on the right to privacy in Texas and that the false light invasion of privacy was recognized in *Billings v. Atkinson*.[376] Thus, it remains to be seen whether Texas will recognize the tort of "false light" invasion of privacy.

374. *Id.*
375. *Id.* at 202-12.
376. 489 S.W.2d 858 (Tex. 1973).